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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 631

NORTHWEST STEEL ROLLING MILLS, INC., A WASHINGTON CORPORATION; VERNON A. GENT; AND HENRY M. RICHARDSON,

Petitioners,

vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

To the Honorable, the Supreme Court of the United States:

Your Petitioners respectfully show:

Summary of the Matter Involved

Your petitioners, Northwest Steel Rolling Mills, Inc., a Washington corporation, Vernon A. Gent and Henry M. Richardson seek to review the judgment of the United States Emergency Court of Appeals entered on February 12, 1954 dismissing petitioners' complaint challenging the validity of certain portions of Ceiling Price Regulation 5

as it stood on November 28, 1951 (Collation 1, 16 F.R. 12000).

Petitioners are defendants in a criminal action pending in the United States District Court for the Western District of Washington, Northern Division. The criminal proceeding is Cause No. 48577 in that court. Petitioners are charged in the District Court indictment with "buying and receiving" varying amounts of:

> "Grade 34 unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". (R. 21, 22)

And paying prices therefor alleged to be in excess of those permitted by CPR 5.

The corporate petitioner is the employer of the individual petitioners and is engaged in the business of melting iron and steel scrap and converting it into steel products. The individual petitioners are subordinate employees of the corporate petitioner and their duties require them to weigh scrap brought to the plant of the corporate petitioner (R. 35).

Although CPR 5 is no longer effective for any purpose, the petitioners asked the United States Emergency Court of Appeals for a declaration that the regulation was invalid as it stood on November 28, 1951. That court not only has the power to entertain a complaint which seeks affirmative relief against a provision of an existing price regulation, but also has the power to declare that a provision of a regulation was invalid at a time in the past when the complaining party is alleged to have violated it. *Montgomery Ward & Co., Inc.* v. *Bowles,* (USECA 1945) 147 F. (2d) 858.

Subsequent to the indictment in the District Court, the petitioners were granted leave to file their complaint in the United States Emergency Court of Appeals to challenge

the validity of CPR 5 insofar as it purported to fix a maximum price for Grade 34 unprepared steel scrap (R. 40, 41). Section 408 (E) (1) of the Defense Production Act of 1950 (50 USCA App., Section 2108 (E) (1)) sets up the procedure whereby the defendant in a criminal proceeding charging violation of the provisions of a price regulation is permitted to file a complaint in the United States Emergency Court of Appeals setting forth objections to the regulation. Such leave is granted where the District Court finds that the defendants' objection to the regulation is made in good faith and where there is a reasonable and substantial excuse for the defendants' failure to present such objections in an earlier protest.

CPR 5 listed in Section 3 thereof, 34 grades of scrap of industrial origin. Opposite each grade was listed the maximum price which might be paid or charged for such grade. In the regulation the grades were divided into three separate categories. The first was designated "Open Hearth and Blast Furnance Grades" and comprised Grades 1 through 10. The second was designated "Electric Furnace and Foundry Grades" and comprised Grades 11 through 31. The last was designated "Unprepared Grades" and comprised Grades 32 through 34.

The first two categories above listed and Grades 1 through 31 were defined in detail as to dimensions and characteristics by Section 23 of CPR 5 under the heading "Specifications". However, the third category denominated "Unprepared Grades" was described only under Section 28 of CPR 5, under the heading "Definitions" as follows:

> "(n) 'Unprepared scrap'. The term shall have its customary trade meaning and shall not include demolition projects as automobiles, bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its own wheels . . .".

A careful reading of CPR 5 discloses that although Grades 1 through 31 were described in detail under Section 23 entitled "Specifications", *Grades 32 through 34 were described only by the reference to "customary trade meaning" as set forth in Section 28 above.*

In obtaining leave of the District Court to file their complaint in the United States Emergency Court of Appeals and in the latter court, the petitioners relied on and now rely on the following objections to CPR 5:

(1) By the terms of CPR 5 an indefinite and vague standard was purportedly adopted subject to fluctuation without notice to persons subject to the regulation.

(2) CPR 5 unlawfully and unconstitutionally delegated the function of defining "unprepared scrap" to private individuals.

(3) CPR 5 was ambiguous in that it purported to apply more than one ceiling price to the same scrap items (R. 37, 38, 39, 42).

Subsequent to the filing of petitioners' complaint in the United States Emergency Court of Appeals, respondent filed his answer denying generally that CPR 5 was defective in the particulars above charged (R. 43). Thereafter, upon application of the petitioners, the United States Emergency Court of Appeals authorized petitioners to introduce evidence in affidavit form relative to the customary trade meaning, if any, which had been attributed to the term "unprepared scrap" (R. 1, 2, 3).

Affidavits were filed on behalf of the petitioners by Harry Goetz, Jr. (R. 7), Manager of the corporate petitioner, and Harry Schwartz (R. 5) proprietor of the Alaska Junk Company in Seattle and past president of the Seattle Chapter of the Institute of Scrap Iron and Steel. In support of the regulation the respondent submitted the affidavit of

one David C. Holub (R. 11). In rebuttal petitioners submitted a further affidavit by Harry Goetz, Jr. (R. 19).

The basic facts set forth in petitioners' affidavits relative to the existence of any "customary trade meaning" wherein the term "unprepared scrap" might be defined are as follows:

There never has been an established trade custom whereby the limits or dimensions of articles of scrap comprising a definite group known as "unprepared" are defined (R. 5-9). Nor is it possible from the nature of the meaning given to that term by the trade that there could have been a definitive class of scrap items belonging in such category. According to trade usage, scrap is "unprepared" if not usable in a particular consumer's melting facilities without further preparation such as cutting, flattening, baling or compressing (R. 5-9). Conversely, scrap has been and is designated as "prepared" by the trade only if usable in a particular consumer's melting facilities without any further preparation of the variety above described (R. 5-9).

Accordingly, whether scrap would be deemed "prepared" or "unprepared" by the trade at large is determined solely by the usages and needs and melting facilities of the consumer who wishes to use it (R. 5-9). Stated in other words, inherent in the use of the words "prepared" or "unprepared" is a knowledge of the needs and melting facilities of the consumer using the scrap to which those adjectives are sought to be applied.

Further, because of the above circumstances, whether scrap is "prepared" or "unprepared" as to a particular consumer has been and is a matter which is subject to change and fluctuation as that consumer's needs and melting facilities may change or fluctuate. Scrap which had been denominated "prepared" by a particular consumer

would become "unprepared" as to him should he reduce the size of his melting facilities or should he, for operational reasons, desire a greater density of metal in a single furnace charge (R. 5-9).

On the other hand, should a particular consumer increase the size of his melting facilities or should he decide for operational reasons that the density of the metal in a single furnace charge might be less than that formerly used, items of scrap which had theretofore been "unprepared" as to him, would become "prepared" because requiring no further handling by the consumer prior to use (R. 5-9).

The needs and melting facilities of consumers of iron and steel scrap may and do differ widely. Accordingly, scrap items which are "unprepared" as to one consumer, beause requiring further preparation by him prior to use, are nevertheless "prepared" as to another whose furnace may be larger or whose operational procedures may differ (R. 5-9).

The largest of the two electric furnaces operated by the corporate petitioners has only a 10-foot diameter inner shell with a rounded bottom. In order to give a maximum density charge in a furnace of that size, in order to eliminate additional charges and to reduce melting time, scrap items, to be "prepared" as to the corporate petitioners' melting operation, must not only conform to the necessary requirements as to thickness, but may not be more than 18 inches in maximum dimension (R. 6-9). Accordingly, although scrap items may conform in every respect to the specifications for Grades 3 and 4 of the Open Hearth and Blast Furnace Grades or to the specifications for Grades 11, 12, 13, 16, 17 of Electric Furnace and Foundry Grades, such scrap items may nevertheless be "unprepared" as to petitioner, Northwest Steel Rolling Mills, Inc., because requiring further preparation prior to use by it (R. 5-9).

The position of the respondent's witness Holub, on the other hand, may be summarized as follows:

Section 28(n) of CPR 5 did not purport to furnish a definition of "unprepared scrap". It only had been taken to mean that in accordance with trade usage, unprepared scrap did not include demolition projects (R. 13, 16). On the other hand, if the regulation was read to mean that Section 28(n) purported to define "unprepared scrap" the definition therein contained relative to "customary trade meaning" was sufficient, for in fact, according to "customary trade meaning" all grades of scrap not included within the specifications for Grades 1-31 contained in the regulation had been regarded by the trade as "unprepared" (R. 13, 14). It was Mr. Holub's position that the regulation, on its face, indicated that the unprepared grades (Grades 32-34) contained everything not set forth in the specifications for the prepared grades, but that even if such an inference could not be drawn from a reading of the regulation itself, that trade custom established that such was the fact.

Mr. Holub denied that scrap was prepared or unprepared depending upon whether, without further preparation, it was suitable for facilities of any specific consumer (R. 16).

It is significant that the petitioners' position relative to the trade custom, if any, from which the meaning of the term "unprepared scrap" might be ascertained, is directly and substantially confirmed by a statement made by the Director of Price Stabilization on October 17, 1952 prefacing a later amendment to the regulation here challenged. In his "Statement of Considerations" preceding Amendment 11 to CPR 5 (17 F. R. 9240) the Director of Price Stabilization said:

> "In the absence of such a regulation as CPR 5, each consumer determines, according to his own individual requirements what scrap he wishes to accept. It is

> customary for all purchase contracts of iron and steel to contain the proviso that such scrap must be 'suitable and acceptable to the consumer'. The superintendent of the furnaces, either in his own discretion or on orders from his superiors, will determine what is suitable and acceptable, taking into consideration their melting practices, the steel to be produced from the melt, the reliability of the shipper and source of the scrap and the availability of scrap and pig iron in the market."

On the forgeoing evidence and on written briefs filed by the respective parties the United States Emergency Court of Appeals refused to find CPR 5 unconstitutionally vague and indefinite. In a written opinion filed on February 12, 1954 (R. 45), the Emergency Court stated that although the regulation did not describe Grades 1-31 as "prepared grades", the fact that Grades 32-34 were described as "unprepared grades" indicated to the reader that the Grades 1-31 were "prepared" (R. 51). From this assumption, the court reasoned that the regulation meant that all grades not included within the specifications for Grades 1-31 must have been the "unprepared grades". Further, in support of this reasoning, the court found that the evidence submitted by the respondent supported the contention that the customary trade meaning given to the term "unprepared scrap" established that unprepared scrap was everything not conforming to the specifications for Grades 1-31 of CPR 5 (R. 51). The court on February 12, 1954 entered its opinion and judgment (R. 53) directing the dismissal of petitioners' complaint.

Jurisdiction

Jurisdiction of this Court is invoked under Title 50, U. S. C. App. Sec. 2108(d) and under Title 28, U. S. C. Section 1254(1).

Questions Presented

1. Does a provision of a price regulation referring those subject thereto to "customary trade meaning" for a definition of commodities for which prices are therein prescribed satisfy the requirements of the Fifth and Sixth Amendments to the United States Constitution? Does such a law, penal in nature, deprive those subject thereto of liberty or property without due process of law? Does such a law violate the right of an accused to be informed of the nature and cause of the accusation against him?

2. Does a price regulation which refers simply to "customary trade meaning" for a definition of commodities for which prices are therein specified, unlawfully and unconstitutionally delegate to private individuals the function of law making so as to deprive those persons subject thereto of rights safeguarded by the due process clause of the Fifth Amendment of the United States Constitution?

3. May an administrative officer such as the Director of Price Stabilization constitutionally leave to courts and juries in criminal proceedings brought under price regulations the task of determining the *existence* of a "customary trade meaning" and the *nature* thereof as a condition precedent to ascertaining the guilt or innocence of the accused in such a criminal proceeding?

4. Can the guilt or innocence of an accused in a criminal proceeding rest on the determination of conflicting testimony of experts as to the meaning of terms used in the law under which the defendant is charged?

5. May a citizen subject to a price regulation be referred to a comprehensive study of economic and trade conditions in order to arrive at the meaning of terms used in such a regulation, and must those subject to such a regulation guess at their peril whether commodities purchased by them

come within the definitions of terms contained in such a regulation?

6. Is a price regulation unconstitutionally vague and ambiguous which on its face prescribes more than one ceiling price for the same item and furnishes no explanation as to how the ambiguity is to be resolved?

Reasons for the Allowance of the Writ

The reasons relied upon by petitioners for allowance of the Writ are as follows:

1. It is well understood that price regulations, although not presently in effect, are carefully kept and preserved for future use. In the event of a national emergency it is common practice for regulations which may have been applicable during an earlier emergency to be brought out, dusted off and used without change. An example of this situation was the recent Korean conflict. When government regulations were imposed under the Defense Production Act of 1950 in many instances the Price Stabilization Administration used regulations which had formerly been enforced during World War II. Under such a situation, it is highly important that constitutional challenges to the validity of a former regulation be resolved to avoid controversy in the future.

2. Irrespective of specific regulations the practice of the Director of Price Stabilization of referring to "customary trade meaning" for definitions of commodities whose prices are regulated should be examined and clarified. It is concededly a difficult task in times of emergency to adequately cover all areas and commodities in need of regulation. Nevertheless, the Director of Price Stabilization must be governed by some sufficient standards in order to protect the basic rights and constitutional guarantees of our citizens. A ruling by this court as to the acceptability of the

practice herein employed by the Director of Price Stabilization is desirable and necessary for the guidance of future administrative officers who may be confronted with the task of promulgating regulations in another emergency.

3. The matters presented in this case are novel since to the petitioners' knowledge no decision of this Court has ever been rendered specifically dealing with the right of the administrator to simply refer to "customary trade meaning" in providing those subject to a regulation with a definition of items therein regulated.

4. It is only in this proceeding that the corporate and individual petitioners may challenge the validity of the regulation with a violation of which they are charged in the criminal proceeding *Yakus* v. *United States* (1944), 321 U. S. 414, 88 L. Ed. 834, Title 50 U. S. C. App., § 2108(d). As matters presently stand under the opinion of the United States Emergency Court of Appeals (R. 45) the District Court, in a trial of the criminal proceeding, will be required to submit to the jury the conflicting testimony of experts for determination of the question whether the term "unprepared scrap" has any "customary trade meaning" and if so whether the articles purchased by petitioners constituted "unprepared scrap" according to that meaning as found. Whether a jury may constitutionally be left to determine the meaning of terms used in the law under which the defendant is charged is an important federal question which should be settled by this Court prior to a trial of this criminal proceeding or future proceedings brought under similar regulations.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue from this Court directed to the United States Emergencey Court of Appeals to the end that the opinion and judgment of the United States Emergency Court of Appeals holding that the petitioners' complaint should be dis-

missed, may be reviewed and determined by this Court and that the judgment below dismissing petitioners' complaint be reversed by this Court and that the petitioners have such other and further relief as this Court may deem proper.

Dated this 12th day of March, 1954.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
DE WITT WILLIAMS,
WILLIAM A. HELSELL,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 631

NORTHWEST STEEL ROLLING MILLS, INC., A WASHINGTON CORPORATION; VERNON A. GENT; AND HENRY M. RICHARDSON,

Petitioners,

vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY,

Respondent

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the United States Emergency Court of Appeals is Cause No. 635 before that court and is not yet found in the official reports. The opinion is set forth in full, however, at (R. 45-52, inclusive). The Order of the United States District Court for the Western District of Washington, Northern Division, granting to petitioners leave to file their complaint with the Emergency Court of Appeals is set forth as an exhibit to the petitioners' complaint (R. 40, 41).

Jurisdiction

The opinion and judgment of the United States Emergency Court of Appeals was rendered February 12, 1954. No petition for rehearing was filed. The statutory provisions sustaining jurisdiction of this court are Title 50, U. S. C. App. Section 2108 (d) and Title 28, U. S. C. Section 1254 (1)

Statement of the Case

The corporate petitioner, Northwest Steel Rolling Mills, Inc., is a Washington corporation engaged in the business of melting iron and steel scraps into ingots and then rolling those ingots into steel bars. In connection with its business activity the corporate petitioner purchases steel scrap on the open market. The individual petitioners are subordinate employees of the corporate petitioner and their duties required them to weigh scrap brought to the plant of the corporate petitioner (R. 35). The petitioners here are defendants in a criminal suit in the United States District Court for the Western District of Washington, Northern Division, in which each of the 21 counts of the indictment charges them with buying and receiving from various sellers:

> "Grade 34 unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". (R. 21, 22)

Petitioners are charged with paying prices for such scrap alleged to be in excess of those permitted by Ceiling Price Regulation 5. *No other or further definition or description of items allegedly purchased by the petitioners is contained in the indictment.* The alleged purchases of scrap occurred during March, April and May, 1952 at which time Collation 1 of CPR 5 was in effect (16 F. R. 12000).

Leave was granted to petitioners to file their complaint

in the United States Emergency Court of Appeals pursuant to Section 408(e) (1) of the Defense Production Act of 1950 (Title 50 U. S. C., App. Section 2108(e) (1)), challenging the validity of CPR 5 insofar as it purported to fix a maximum price for Grade 34 unprepared steel scrap (R. 40, 41, 42).

Although Grades 1 through 31 set forth in CPR 5 were defined in detail as to dimensions and characteristics by Section 23 of CPR 5 under the heading "Specifications", Grades 32-34 denominated "Unprepared Grades" were described only under Section 28 of CPR 5 under the heading, "Definitions" as follows:

> "(n) 'Unprepared scrap'. The term shall have its customary trade meaning and shall not include such demolition projects as automobiles, bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its own wheels . . . "

In the case before the Emergency Court of Appeals, the petitioners challenged the validity of CPR 5 and the definition therein contained for the Grade 34 unprepared scrap (with the purchase of which petitioners are charged in the criminal proceeding) asserting that CPR 5:

> 1. Adopted a vague and indefinite standard subject to fluctuation without notice;
> 2. Unlawfully delegated the function of defining "unprepared scrap" to private individuals; and
> 3. Was ambiguous in that it purported to apply to more than one ceiling price to the same scrap items (R. 37-39, inclusive).

As is shown by the petition herein, the petitioners introduced evidence before the United States Emergency Court of Appeals in affidavit form wherein it was established that the only meaning customarily given to the term "unprepared scrap" by the trade was that whether scrap was pre-

pared or unprepared depended upon the facilities of the purchaser (R. 5-9). If scrap was of a size suitable, without further preparation, such as cutting, flattening, baling or compressing for melting in the purchaser's furnace, it was, as to him, "prepared" (R. 5-9). If, on the other hand, further preparation was necessary to make scrap suitable for a particular consumer's use, it was, in trade usage, "unprepared" as to him (R. 5-9). The needs and melting facilities of consumers generally varied and fluctuated and accordingly, scrap which might be "prepared" as to one consumer would nevertheless be "unprepared" as to another whose melting facilities might require further preparation prior to use (R. 5-9). Or, if a particular consumer should change the size of his melting facilities or alter his melting practices, scrap which had theretofore been "prepared" as to him might, by such change, become "unprepared" (R. 5-9).

The United States Emergency Court of Appeals found the regulation to be clear and unambiguous and further found that the customary trade meaning was such as to indicate that any item of scrap which did not conform to Grades 1-31 of the regulation, was regarded as "unprepared". The court arrived at its conclusion despite the fact that the melting facilities of the corporate petitioner were concededly of such size that many items of scrap, although conforming to the specifications for one of the Grades 1-31 of the regulation, nevertheless might require further preparation prior to use by the corporate petitioner, and which, according to petitioners' version of trade custom, were nevertheless unprepared as to it. A more detailed summary of the facts is set out in the preceding petition which is hereby adopted and made a part of this brief.

Specification of Errors

1. The United States Emergency Court of Appeals erred in holding that CPR 5 was not unconstitutionally vague and indefinite.

2. The court erred in holding that the evidence established, the existence of a trade custom which confirmed the contention of the government that all items of scrap not coming within the specifications of Grades 1-31 of the regulation were "unprepared".

3. The court erred in sustaining a regulation which leaves to courts and juries in criminal proceedings, the task of ascertaining the existence of a trade custom whereby "unprepared scrap" was defined and of ascertaining the nature or articles allegedly classified by the trade as "unprepared".

4. The court erred in refusing to find that CPR 5 unlawfully delegated the function of defining "unprepared scrap" to private individuals.

5. The court further erred in dismissing petitioners' complaint.

ARGUMENT

I

If Section 28(n) of CPR 5 be given the construction urged by the Government, no definition whatsoever of unprepared scrap is found in the regulation.

It must be noted at the outset that it is the peculiar position of the United States that Section 28(n) of CPR 5 does not purport to be a definition of "unprepared scrap". Mr. Holub states with reference to Section 28(n) that it "has always been taken to mean simply that in accordance with customary trade meaning, unprepared scrap does not include demolition projects" (R. 13). Mr. Holub says again, (R. 16) " . . . It seems important to make it clear that

Section 28(n) of the regulation is extraneous to this whole question."

If we correctly understand the position of the government (and we must assume that the United States will take the same position in the criminal proceeding against the petitioners as it does here) it is immediately apparent that nowhere in the regulation is found any definition whatsoever of the term "unprepared scrap", although the term is employed to establish a supposed category of scrap metal and to fix a ceiling price therefor. It is plain from the very divergence of the statements set forth in the affidavits in the record that the term "unprepared scrap" is not a word of art nor does it have any definitive trade meaning sufficient to apprise those subject to the regulation as to just what items of scrap are included in Grades 32-34 of CPR 5. If the government is correct in the construction it places on Section 28(n) there is no definition whatever of the critical term "unprepared scrap" in the regulation, and petitioners' challenge to the regulation, based on its failure to properly define that class of scrap must be sustained.

In the absence of any definition of the term, the regulation is similar to the statute of the State of Oklahoma which was before this Court in *Champlin Refining Co. v. Corporation Commission of the State of Oklahoma*, 286 U.S. 210, 76 L. Ed. 1063. The statute there involved prohibited the production of petroleum in such manner or under such conditions as to constitute "waste". The statute in question was a penal statute and in holding it unconstitutional for absence of any adequate definition of the practice therein forbidden, this court said at page 1082 of the Lawyers' Edition opinion (286 U.S. 242):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' ''

The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the act the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste . . .''

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. *It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.*'' (Italics added.)

In *Lanzetta* v. *New Jersey*, 306 U.S. 451, 83 L. Ed. 88, the appellant who had been defendant in the court below, challenged a New Jersey statute making it a crime for a person not engaged in any lawful occupation who had been previously convicted of a crime or disorderly conduct to be a known member of any "gang". Because of the complete failure of the state statute to adequately define the word "gang", the statute was held unconstitutional. This court said at page 893 of the Lawyers Edition opinion (306 U.S. 458):

> "The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

Of course, it is the further position of the government that the regulation itself defines "unprepared scrap" in that it somehow establishes that the "unprepared grades" are all those items which do not come within any of the so-called "prepared grades" (R. 12-13). In other words, it is apparently the contention of the government that any item of scrap which cannot be included within Grades 1 through 31 under the Specifications prescribed therefor in Section 23, must of necessity fall within the Unprepared Grades Numbers 32-34. *If this is a proper construction of CPR 5, it is strange that the framers thereof did not so state and, we submit, the failure of the regulation to be specific is in itself a defect which should be fatal in this proceeding challenging its validity.* Under Section 14 of CPR 5, a seller (and only a seller) was given the privilege of applying for a price on scrap grades not listed in the regulation. In view of this concession in the regulation itself that it did not cover all grades of scrap, it is difficult to see wherein it follows that any scrap item not included within the Specifications of Grades 1 through 31, was of necessity "unprepared scrap" and belonged in Grades 32 through 34.

II

CPR 5 does not, itself, define unprepared scrap except by the definition set forth in Section 28(n), wherein such scrap is defined as having its "Customary Trade Meaning."

Actually, a careful reading of CPR 5 discloses that the term "unprepared scrap" as used therein is purportedly defined in Section 28(n), wherein such scrap is defined as

having "its customary trade meaning". As pointed out above, it is the contention of the government, as shown by the affidavit of Mr. Holub, that Section 28(n) does not purport to be a definition of unprepared scrap. Mr. Holub states with reference to Section 28(n) that "has always been taken to mean simply that in accordance with customary trade meaning, unprepared scrap does not include demolition projects" (R. 13). That such is not a proper construction of that paragraph is apparent from the wording thereof. It is significant that Section 28 of CPR 5, is entitled "Definitions". Sub-paragraph (n) is only one of a number of similar sub-paragraphs, each defining the meaning of terms as used in the regulation. The fact that Section 28(n) states that unprepared scrap "shall have its customary trade meaning *and* shall not include . . ." indicates by the very use of the word "and" an intent to define "unprepared scrap". Had the meaning of the section been that urged by Mr. Holub, the words "shall have its customary trade meaning" could and would have been eliminated therefrom. To express such a meaning the paragraph simply would have read:

> "(n) 'Unprepared scrap'—the term shall not include such demolition projects as bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its wheels . . ."

The conclusion is inescapable that the regulation purported to define "unprepared scrap" by reference to some purported trade custom.

The opinion of the Emergency Court of Appeals indicates an understanding by that court that Section 28(n) was intended to provide a definition of "unprepared scrap". The opinion makes it plain that in the view of that court the United States will be required to prove at the trial of the criminal action the nature and existence of the custom

on which it relies and knowledge of which is imputed to petitioners (R. 51, 52).

III

CPR 5, by the terms of Section 28(n) thereof, unlawfully and unconstitutionally delegates the function of defining "Unprepared Scrap" to private individuals.

It is impossible to ascertain from the regulation itself whether the "customary trade meaning" referred to in Section 28(n) was one in existence at the time of promulgation of the regulation or whether the framers intended that whatever trade meaning was in effect at the time of a particular transaction should control. If the latter be the meaning of Section 28(n), CPR 5 has left to the trade itself the function of defining those items denominated by said regulation as "unprepared scrap". In any judicial proceeding where "trade custom" is considered, it is usually deemed to be the custom at the time of the subject transaction.

As has been established by the evidence there has been no definitive trade custom whereby the limits and dimensions of articles of scrap are fixed in one particular category known as "unprepared". There has been, at most, only a meaning given by the trade to the word "unprepared" which falls far short of fixing with any certainty the items of scrap to which that adjective is applied. The word "unprepared" has been used to mean only that as to a particular consumer, an item of scrap is not usable in his melting facilities without further preparation. In view of this meaning of the word, it is apparent that a definition of "unprepared scrap" as having its "customary trade meaning" is no definition at all. However, even if the regulation be construed to mean that the practices of a majority of the industry at the time of a particular transaction should be controlling, there has been an unlawful delegation of legislative power to private persons.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, the Bituminous Coal Conservation Act of 1935 was held unconstitutional. That act provided that whenever the maximum daily and weekly hours of labor were agreed upon by the producers of more than two-thirds of the annual national tonnage production of coal and by the representatives of more than one-half of the mine workers employed, such maximum hours of labor should be accepted by all the code members. A similar procedure was employed to determine the minimum wages for the code members. Any producer of coal who failed to comply with provisions of the code so established was compelled to pay an excise tax on the coal produced. Although the statute was not a penal statute, the excise tax was held, of course, to be a penalty to enforce compliance with the code.

In holding the act unconstitutional and in referring to the power conferred on the majority of the members of the trade to inflict their will on the minority, this Court said at page 1189 of the Law Ed. opinion (298 U. S. 311):

> "The power confered upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is neces-

> sarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclosed the question. *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 537, 79 Law Ed. 1584, 55 Supreme Ct. 837, 97 A. L. R. 947;"

So, in this case, even if the regulation be construed to mean that the custom prevailing amongst a majority of scrap metal consumers at the time of a particular transaction was that to be used to determine which items should be deemed "unprepared scrap" there has been an unconstitutional and unwarranted delegation of legislative power to a portion of an industry which may thereby affect and control the rights and business practices of the minority. It is established by petitioners' evidence and it is not disputed that the needs and melting facilities of consumers of scrap metal may and do differ widely (R. 23). Accordingly, those items of scrap which may be deemed "unprepared" likewise differ widely. Even if the existence of a trade custom as to size of scrap items denominated "unprepared" amongst the majority of consumers were to be conceded (which it is most emphatically not) this corporate petitioner should not be compelled to accept the changing standards of its competitors in any determination by them as to which items of steel scrap shall be deemed "unprepared". And how may individuals in the position of the individual petitioners here possibly familiarize themselves with the practices of other consumers of iron and steel scrap at the

time of a given transaction in order to be able to know what articles are currently regarded by the majority of the trade as "unprepared scrap"?

In *Wagner* v. *Milwaukee* (1922), Wisc. 410, 188 N. W. 487, a city ordinance provided that the prevailing wage to be paid to employees of contractors performing work for the city should be determined by "the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor". It was held that the ordinance was unconstitutional in that it delegated to the labor unions the power to determine and fix prevailing wage scale for the city.

It is important to distinguish at this point between the practice attempted by CPR 5, and one which has concededly been held valid in other statutes and regulations. There is little doubt that the Director of Price Stabilization would have had the right to properly define a class of scrap to be designated as "unprepared scrap". Had a sufficient definition thereof existed in CPR 5, it would make little difference that the articles of scrap therein contained did not conform with exactitude to the items of scrap theretofore designated by this corporate petitioner as "unprepared". Unless the action of the Director of Price Stabilization had been arbitrary and capricious or had exceeded the powers given him, Northwest Steel Rolling Mills, Inc. would have been bound by such a definition. The point here made is that no such definition was made by the Director, the party to whom the duty of such definition was delegated. Rather, the Director abdicated and abandoned that duty to the trade at large.

Nor would the petitioners have had cause for objection had the Director of Price Stabilization named a particular existing trade custom (had one in fact existed) and made reference to a trade publication of a particular date wherein the limits and dimensions of the articles of scrap could be

found. In *Norman-Frink, Inc.* v. *Arnall* (USECA 1952) 196 F. (2d) 502, the court held a ceiling price regulation on automobiles valid where it established as a maximum price for any used automobile the highest price listed for such automobile in the January 1951 issue of the Used Automobile Guide used by the seller during a prescribed base period.

In *Brister & Koester Lumber Corp.* v. *Turney* (USECA 1949) 176 F. (2d) 843, appears another example of an acceptable practice in drafting regulations such as this one. In that case there was involved O.P.A. Maximum Price Regulation 19, wherein the grades and terms were defined as being based on the "1939 standard specifications . . . of the Southern Pine Inspection Bureau."

Had respondent here made reference to an existing standard and to a particular publication (had one existed) wherein such standard could be located, petitioners would have no quarrel with the regulation. In such a case, persons subject thereto could easily ascertain the nature of the articles for which maximum prices were established. In CPR 5, however, no reference is made to any existing trade publication wherein the term "unprepared scrap" was defined nor could any such reference have been made for the reason, as shown by the evidence, that that term has never been applied to any definitive classification of scrap items ascertainable and fixed. By leaving the definition of the unprepared grades of scrap to the industry itself and even to the individual consumers (under the meaning attributable to the term "unprepared scrap" as established by petitioners' evidence) the Director of Price Stabilization created a situation of hopeless confusion wherein it was impossible for those subject to the regulation to ascertain what items were referred to therein.

IV

The vagueness, indefiniteness and ambiguity of CPR 5 render it violative of the Fifth and Sixth Amendments to the United States Constitution.

Even if it be assumed that CPR 5 had reference to some purported trade custom in existence at the time of its promulgation, the trade meaning attributed to the term "unprepared scrap" (if it can be honored by the designation "custom") was such as established by the evidence as to amount to no definition whatsoever. It is impossible to ascertain from the regulation whether the standard referred to by the framers was one purportedly adopted by the majority of the industry, by the minority, or whether the standard was one to be ascertained by the practices of each individual consumer. If the standard intended was one established purportedly by the majority of consumers it is not indicated how a consumer in the position of the corporate petitioner or how the individual petitioners herein could possibly have familiarized themselves sufficiently with industry practices in general to have been cognizant of the standards accepted by the majority if such existed. Persons subject to the regulation should hardly be required to make an independent investigation of trade practices and to ascertain for themselves which standards were used by a majority of their competitors in order to determine whether or not a particular purchase at a particular price was permissible. It was the duty of the Director of Price Stabilization to define what he desired to punish, not to refer the citizen to a comprehensive study of economic and trade conditions in order to ascertain what acts were prohibited. To enforce this regulation would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner, so that no

one could make a copy of it." *Suetonius, Lives of the Twelve Caesars*, page 278.

In many instances this Court has struck down acts of Congress providing for criminal penalties where the terms thereof were more definite than those contained in this regulation. In *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89, 65 Law. Ed. 516, 520, the defendant had been convicted in the lower courts under an act which declared criminal the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries". The act contained no definition of an "unjust or unreasonable rate" nor did it refer to any source where the measure of "unjust or unreasonable" could be ascertained. This court held that the act in effect required the court and jury to determine the standard of what constituted an unjust or unreasonable rate or charge and therefore held the same unconstitutional. The court said at page 520 of the Lawyers Edition (255 U.S. 89):

> ". . . to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimate of the court and jury."

In *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 58 Law. Ed. 1284, this court had before it the anti-trust law of the State of Kentucky prohibiting any combination having for its purpose or with the effect of fixing a price that was greater than the real value of the article. Subsequent Kentucky cases had declared that the "real value" of an article was the "market value under fair competition and under normal conditions". This court held that the statute was unconstitutional in that it required a combination to guess at its peril as to the real value of articles sold by it.

Referring to the defendants the court said at page 1288 of the Lawyers Edition opinion (234 U.S. 223):

> "To compel them to guess, on peril of indictment, what the community would have given for them (articles sold) if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (Matter in parentheses added.)

In *Connally* v. *General Construction Company*, 269 U.S. 385, 70 Law. Ed. 322, the court had before it a penal statute requiring a contractor to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed". The court said in holding the law unconstitutional at page 328 of the Lawyers Edition report (269 U.S. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary nations of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law".

Further, the court said referring to the statute:

> "And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, though it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in

> itself or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal."

So, in the case at bar, the statutory term "unprepared scrap" if it have any meaning in the trade, is one whose meaning is dependent upon the facilities of different consumers and whose meaning varies as those facilities and needs vary. As was said in the *Connally* case:

> "The result is that the application of the law depends not upon a word of fixed meaning in itself or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries . . ."

V

CPR 5 is ambiguous and establishes more than one ceiling price for the same scrap items.

It will be noted that the affidavit of the government's witness, Holub, and the opinion of the Assistant Administrator (R. 37) in this matter do not directly refute the evidence of petitioners as to the customary grade meaning of the words "unprepared scrap". Rather, the government inferentially takes the position that the "customary trade meaning" attributed to those words is not essential to a definition of the term and further states that even if the customary trade meaning be essential to a definition of the term as used in CPR 5, that according to that trade meaning, unprepared scrap has always been those items not falling within the Grades 1-31 explicitly defined in the regulation. This theory assumes that all consumers of scrap have

identical melting facilities and that those facilities are such that items of scrap falling within Grades 1 through 31, of the regulation are usable therein without further preparation. Such an assumption flies directly in the face of the evidence submitted by petitioners that the needs and melting facilities of scrap consumers differ widely (R. 23). It further is inconsistent with the evidence as to the melting facilities used by this corporate petitioner (R. 6-9) and it is significant that the government does not exclude the corporate petitioner from its class of standard furnace and foundry operations. It will be noted, therefore, that there is a basic ambiguity in the regulation nowhere resolved by the government evidence. Although prescribed prices are set forth therein for Grades 3 and 4 and Grades 11, 12, 13, 16 and 17, it is apparent, nevertheless, that scrap items coming within those listed grades may be "unprepared" as to the corporate petitioner and other consumers of scrap whose melting facilities require scrap of smaller dimensions than the maximum permitted for those grades. In such a case, is the purchaser of scrap permitted by the regulation to pay the larger prepared price prescribed for the grade? Or, because such scrap is "unprepared" as to him, must he pay the lower unprepared price? It will be noted that the opinion of the Assistant Administrator assumes that in such an instance the consumer is entitled to pay the larger price (R. 34). *However, the Regulation does not so state.* This ambiguity has another more serious effect in the pending criminal proceeding. The indictment charges petitioners only with purchasing "Grade 34 Unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". No other or further definition of items allegedy purchased by petitioners is set forth. Is it the theory of the government that the scrap purchased by the corporate petitioner was "unprepared" because requir-

ing further preparation by petitioner even though complying in every respect with one of the "prepared" Grades 1 through 31, or is it the theory of the government that the corporate petitioner purchased items of scrap exceeding even the dimensions of the Grades 1 through 31? The definition therein contained leaves ample room for the former contention and the fact that the wording of the regulation permits such an ambiguity to exist in the charge of an indictment phrased in its exact language amply demonstrates the uncertainties inherent in CPR 5 which are not resolved by any language found therein.

Summary and Conclusion

1. The position taken by the government to the effect that Section 28(n) of CPR 5 was not intended to provide a definition of "unprepared scrap" is sufficient ground alone for sustaining petitioners' challenge to the validity of CPR 5. Absent any definition of the term "unprepared scrap", the Regulation fails completely to fix any informing standard of criminality by which those subject thereto may be governed. The term is not a word of art nor does it have any established meaning in the trade sufficient to provide those persons subject to the regulation with an ascertainable standard of conduct:

(a) The contention of the government that the regulation elsewhere established inferentially that "unprepared scrap" is any scrap item not coming within the Specifications for Grades 1-31, is not borne out by the regulation itself.

(b) Nor can it be said from the evidence that the trade at large has customarily designated items not falling within the Specifications of Grades 1-31 as "unprepared". Petitioner's own furnaces and those of others similarly situated render many items falling within Grades 1-31 "unprepared" and it is not nor

could it be the position of the Government that the corporate petitioner is not a member of the "trade" subject to the regulation.

2. In fact, a fair reading of the regulation and Section 28(n) discloses that CPR 5 referred those subject thereto to "customary trade meaning" for a definition of unprepared scrap.

(a) If that trade meaning be construed to be whatever meaning was accorded the term "unprepared scrap" by the trade *at the time of a particular transaction,* CPR 5 unlawfully and unconstitutionally delegates a legislative function to private individuals.

(b) If on the other hand CPR 5 be construed to refer to some trade meaning allegedly given to the term "unprepared scrap" *at the time of promulgation of the Regulation,* CPR 5 is void for indefiniteness and ambiguity.

3. The very fact that the above difficulties exist in ascertaining the meaning of the regulation is ample reason for sustaining petitioners' contention that CPR 5 is so insufficient, vague and indefinite as to provide no foundation upon which to predicate a criminal proceeding.

It is respectfully submitted that Ceiling Price Regulation 5, insofar as it purported to provide a ceiling price for and a definition of the "unprepared grades" of scrap is invalid and unconstitutional and we respectfully request that the Petition for Writ of Certiorari herein be granted.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
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Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 631

NORTHWEST STEEL ROLLING MILLS, INC., A WASHINGTON CORPORATION, VERNON A. GENT AND HENRY M. RICHARDSON, PETITIONERS

v.

CHARLES H. KENDALL, ASSISTANT DIRECTOR, OFFICE OF DEFENSE MOBILIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 45-52) has been reported at 210 F. 2d 283.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on February 12, 1954 (R. 53). The petition for a writ of certiorari was filed on March 12, 1954. The jurisdiction of this Court is

invoked under Section 408(d) of the Defense Production Act of 1950 (64 Stat. 808, 50 U.S.C. App. 2108(c), and 28 U.S.C. 1254.

QUESTION PRESENTED

1. Whether the Emergency Court of Appeals correctly refused to invalidate a provision in a former Office of Price Stabilization regulation, alleged to be unconstitutionally vague and indefinite, where petitioner could have obtained, under established Office of Price Stabilization procedure, an official interpretation and clarification of the provision in question, but failed to do so.

2. Whether the terms of the challenged regulation are unconstitutionally vague and indefinite.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Defense Production Act of 1950, as amended (64 Stat. 798, 50 U.S.C. App., Supp. V, 2101, of Executive Order 1061 (16 F.R. 6105), of Office of Price Stabilization Price Procedural Regulation No. 1 [1] (17 F.R. 3787), and of Office of Price Stabilization Ceiling Price Regulation No. 5—Iron and Steel Scrap (16 F.R. 12000) [2] are set forth in the Appendix, *infra*, pp. 11-27.

STATEMENT

Petitioner Northwest Steel Rolling Mills, Inc., a Washington corporation, buys iron and steel scrap and converts it into steel products (R. 37). Its purchases of such scrap were subject to the provisions of Office of Price Stabilization Ceiling Price Regu-

[1] This Regulation is referred to hereinafter as PPR 1.

[2] This Regulation is referred to hereinafter as CPR 5.

lation No. 5 (OPS CPR 5—Iron and Steel Scrap, *infra,* pp. 15-27) (R. 37). The two individual petitioners, Gent and Richardson, are employed as weighmasters by the corporate petitioner (R. 35).

All three petitioners were indicted in the United States District Court for the Western District of Washington, Northern Division, on the charge of unlawfully buying and receiving several loads of Grade 34 unprepared steel scrap—steel scrap defined in Grade 34 of Section 3 of CPR 5 as "Unprepared steel scrap other than material suitable for hydraulic compression"—and paying therefor prices higher than the legal ceilings established by CPR 5 (R. 36, *infra,* p. 19). On December 8, 1952, the district court, upon petitioners' objections to the validity of CPR 5, stayed the criminal action and granted leave to petitioners to reassert those objections in the United States Emergency Court of Appeals (R. 40-41).

Pursuant to such leave, petitioners filed a complaint on January 5, 1953, in the Emergency Court of Appeals, asserting that the term Grade 34 unprepared steel scrap, as defined in CPR 5, was so vague and ambiguous as to be "unconstitutional and void" (R. 35, 37, 39). Under OPS Price Procedural Regulation 1, *infra,* pp. 14-15, petitioners could have requested and obtained an official interpretation from OPS as to the meaning of CPR 5, but the complaint does not allege that such an interpretation had been sought (R. 35-42). An answer, filed on behalf of the Price Stabilization Director, denied the material allegations of the complaint (R. 43).

The Emergency Court of Appeals, after weighing conflicting evidence on the vagueness issue and analyzing the various provisions of CPR 5, specifically found "that the evidence clearly preponderates in favor of the government's contention" and concluded that the "regulation was not void on the ground that it was vague and indefinite" (R. 51). The court, further noting that petitioners could have obtained immunity from criminal prosecution by simply requesting and obtaining an "official interpretation or clarification" under PPR 1 "if they were in doubt as to what constituted unprepared scrap," dismissed the complaint (R. 51, 52, 53).

ARGUMENT

The decision of the Emergency Court of Appeals, sustaining the validity of CPR 5, is clearly correct. Moreover, in view of the termination of the substantive price control provisions of the Defense Production Act of 1950, the question of the validity of CPR 5 has no prospective importance.

1. Two controlling considerations eliminate all doubt as to the correctness of the decision below in refusing to invalidate CPR 5 on the ground of uncertainty and indefiniteness. First, an administrative regulation cannot, we submit, be attacked as unconstitutionally ambiguous where those subject to the regulation have open, under established procedures, the opportunity to be informed by the administrative agency which issued the regulation precisely what is required. Second, even without recourse to any official, administrative interpretation, CPR 5's provisions, far from being ambigu-

ous, plainly define "Grade 34 unprepared steel scrap" in a manner sufficiently definite and intelligible to those purchasing that material.

a. The essential purpose of the "void for vagueness" doctrine is to make certain that individuals are warned, in advance, of the type of act made criminal. *Jordan* v. *DeGeorge*, 341 U.S. 223, 230. Consequently a penal statute which does not give sufficiently definite notice to one who would avoid its penalties is void as an unconstitutional deprivation of due process. *Dennis* v. *United States*, 341 U.S. 494, 515; *United States* v. *Petrillo*, 332 U.S. 1, 6; *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340; *United States* v. *Hood*, 343 U.S. 148, 151; *United States* v. *Spector*, 343 U.S. 169, 172. Where the legislature has failed to make itself understood and there are no official agencies whose function it is to issue authoritative interpretations of the statute in advance of the commission of an act which may subject the doer to legal penalties, the legislature's unarticulated command is not to be enforced. Those to whom such a statute applies may not know and have no means of ascertaining what they are required to do or abstain from doing.

But the situation is entirely different where, as here, the administrative agency issues interpretations and clarifications upon request to any person having doubt as to the meaning of any provision of the regulation. Thus, petitioners in the instant case at all times had open to them the means to be informed by the agency which issued the regulation precisely what was required of them. Section 92 of PPR 1 (17 F.R. 3787), *infra*, p. 15, plainly

authorizes "any person desiring an official interpretation of a ceiling price regulation" to "request it in writing" from the "District Counsel" of the Office of Price Stabilization. And Section 91(a) of that regulation, *infra*, pp. 14-15, provides that action taken by such a person "in reliance upon, and in conformity with, an official interpretation * * * will constitute action in good faith pursuant to the provisions of the ceiling price regulation." Accordingly, any doubts petitioners had as to the meaning of CPR 5 could have been resolved by applying for an official interpretation. Had petitioners acted in reliance upon such an interpretation, they would themselves (1) have eliminated any ambiguity they now complain of, (2) have been warned, in advance, of the exact type of conduct made criminal, and (3) at the same time "have been immune to prosecution" (R. 52). As stated by the court below, "If [petitioners] had any doubt as to what constituted unprepared scrap, they should, in ordinary prudence, have asked for clarification of the regulation, for their own protection." (R. 52). Their failure to avail themselves of this opportunity to clarify a regulatory provision that may have appeared ambiguous to them, destroys, we submit, their right to challenge the validity of the regulation on the ground that it is ambiguous. Cf. *Taylor* v. *Porter,* 156 F. 2d 805, 809 (E.C.A.), certiorari denied, 329 U.S. 782.

b. Petitioners' attack on the validity of CPR 5 must also fall for the further reason that the regulatory scheme makes perfectly plain what was meant by "Grade 34 unprepared steel scrap."

Section 1(a) of the CPR 5, which explains "what this regulation does and prohibit[s]," states that "This regulation establishes ceiling prices" for "all sales and deliveries * * * of prepared and unprepared steel scrap." *Infra,* p. 15. Section 3 (a)(1) then prescribes the basing point price for "Grade 1" steel scrap (No. 1 bundles). *Infra,* pp. 16-17. Section 3(a)(2) also prescribes the prices for each of the remaining 33 grades of steel scrap by setting a "differential * * * above or below the price" of Grade 1 for each of the 33 grades. *Infra,* pp. 17-19. These 33 grades are sub-divided by Section 3(a)(2) into three groups: Grades 2 through 10 are the "Open hearth and blast furnace grades"; Grades 11 through 31 are the "Electric furnace and foundry grades; and Grades 32 through 34 are denominated the "Unprepared grades." *Infra,* pp. 17-19.

Section 23 of CPR 5 contains detailed specifications for each of the various types listed in Section 3(a) as Grades 1 through 31. *Infra,* pp. 19-26. These Grades 1 through 31 were obviously the "prepared grades," and all scrap which did not conform to the detailed specifications established for any of these 31 grades was necessarily "unprepared". Since Grades 32 through 34 were described in CPR 5 as "unprepared grades," and since, as already noted, the regulation applied only to prepared and unprepared scrap, then the other Grades, 1 through 31, necessarily were "prepared grades." As observed by the court below, "the inference is almost inescapable [from these various provisions of

CPR 5] that all other grades, entitled 'Open Hearth and Blast Furnace Grades' and 'Electric Furnace and Foundry Grades' are considered 'Prepared Grades', in contrast to those denominated, 'Unprepared Grades' " (R. 48).

Sections 1, 3 and 23 of CPR 5, when considered together, thus eliminate any doubt as to the distinction between prepared and unprepared scrap. The only remaining problem in CPR 5 was to distinquish between the three grades of unprepared steel scrap. This CPR 5 accomplished in Section 3(a)(2)'s definitions of Grades 32 through Grade 34. Grade 32 was defined as "unprepared steel scrap which when compressed constitutes No. 1 bundles"; Grade 33 was "unprepared steel scrap which when compressed constitutes No. 2 bundles"; and Grade 34 was "unprepared steel scrap other than material suitable for hydraulic compression." *Infra,* p. 19. From these definitions in Sections 1, 3 and 23, it is plain that if a quantity of steel scrap did not conform to the specifications for any of the 31 grades set forth in Section 23, it was unprepared steel scrap, and if it was not suitable for hydraulic compression, it was necessarily Grade 34 unprepared scrap.

Against this simple and, we believe, obvious meaning of the term "Grade 34 unprepared steel scrap," as used in CPR 5, petitioner suggests that "If this is a proper construction of CPR 5, it is strange that the framers thereof did not so state" (Pet. 20). The short answer is that, of the many ways in which it might have been said, the method

actually employed by CPR 5 gave, as we have shown, a plain and unambiguous meaning to Grade 34 unprepared steel scrap. And it is, of course, irrelevant that the same result could have been achieved by different language.

Petitioners also argue that Section 28(n) of CPR 5 is unconstitutionally vague because it states that the term "unprepared scrap" shall have "its customary trade meaning." (Pet. 20). But "Grade 34 unprepared steel scrap" was, as we have pointed out, adequately and plainly defined by Sections 1, 3 and 23 of CPR 5, and this makes it unnecessary to examine Section 28(n)'s reference to "customary trade meaning." But even if consideration is given to Section 28(n), it is clear, for the reasons set forth in detail in the opinion below, that there was nothing ambiguous in the term "customary trade meaning," under which, as under Sections 1, 3 and 23 of CPR 5, scrap not conforming to any of the specifications in Section 23 was considered unprepared scrap (R. 13, 14, 51).[3]

2. In any event, the issues raised by the petition have no prospective importance. More than a year ago, on March 17, 1953, all price controls were ter-

[3] Equally without merit is petitioners' contention that the reference in Section 28(n) to "customary trade meaning" constituted an unlawful delegation of power to private individuals (Pet. 22-26). There is no doubt that price ceilings were fixed by the Office of Price Stabilization, not by private individuals, and that the standards laid down by Congress to guide administrative exercise of price-fixing authority were sufficiently definite and precise. See *Yakus* v. *United States*, 321 U.S. 414; *Currin* v. *Wallace*, 306 U.S. 1, 15-16; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 397, 399.

minated. OPS General Overriding Regulation 44 (18 F.R. 1567). And all substantive price control authority under the Defense Production Act of 1950 expired on April 30, 1953. 66 Stat. 296, 306. CPR 5, like all the ceiling price regulations, does not have any prospective force. It is only the pendency of the criminal action against petitioners in the district court which saved the issue of the validity of CPR 5 from becoming moot in the court below. *Haldeman Creamery* v. *Kendall,* 208 F. 2d 360, 363-364 (E.C.A.); see *Stanolind Oil & Gas Co.* v. *Freehill,* 205 F. 2d 305 (E.C.A.). But since that issue is confined to this single case and cannot recur, review by this Court is not warranted.

CONCLUSION

The decision of the Emergency Court of Appeals is correct. The petition raises no issue of prospective or general importance. We respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

APPENDIX

A. *Pertinent provisions of the Defense Production Act of 1950:*

Section 402 (64 Stat. 803, 50 U.S.C. App., Supp. V, 2102), authorizing the imposition of price ceilings, provides in pertinent part:

> SEC. 402. (a) In order to carry out the objectives of this title, the President may encourage and promote voluntary action by business, agriculture, labor and consumers. * * *.
>
> (b) (1) To the extent that the objectives of this title cannot be attained by action under subsection (a), the President may issue regulations and orders establishing a ceiling or ceilings on the price, rental, commission, margin, rate, fee, charge, or allowance paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of any material or service, and at the same time shall issue regulations and orders stabilizing wages, salaries, and other compensation in accordance with the provisions of this subsection.

Sections 703 and 704 (64 Stat. 816, 50 U.S.C. App., Supp. V, 2153, 2154), containing the delegation and rule-making authority under the Act, provide in pertinent part:

> SEC. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate

agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. * * *.

* * * * *

SEC. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act.

Section 408 (64 Stat. 808, 50 U.S.C. App., Supp. V, 2108, as amended, 66 Stat. 302), which authorizes the stay of criminal proceedings in the district court pending a determination by the Emergency Court of Appeals of the validity of Office of Price Stabilization regulations provides in pertinent part:

SEC. 408. (d) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 409 or 706 of this Act, section 205 or 206 of the Housing and Rent Act of 1947, as amended, or section 371 of title 18, United States Code, involving alleged

violation of any provision of any such regulation or order, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the President setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 407 of this title. Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation or order complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the President or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b) and (c) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

B. *Executive Order 10161 of September 9, 1950* (15 F. R. 6105, 6106), delegating price control functions of the President under the Defense Production Act of 1950 to the Economic Stabilization Agency and to the Director of Price Stabilization, provides in pertinent part:

SEC. 401. (a) There is hereby created a new and independent agency to be known as the Economic Stabilization Agency, hereafter in this Part referred to as the Agency. There shall be at the head of the Agency an Economic Stabilization Administrator, hereafter in this Part referred to as the Administrator, who shall be appointed by the President by and with the advice and consent of the Senate.

(b) The Administrator shall seek to preserve and maintain the stabilization of the economy. To this end he shall:

* * * * *

(4) Establish price ceilings and stabilize wages and salaries where necessary.

(c) The functions conferred upon the President by Title IV of the Defense Production Act of 1950 are hereby delegated to the Administrator.

SEC. 402. There shall be in the Agency a Director of Price Stabilization, who shall be appointed by the President by and with the advice and consent of the Senate, and who shall perform such functions with respect to price stabilization as may be determined by the Administrator.

C. *Office of Price Stabilization Price Procedural Regulation No. 1, Revision 2* (17 F.R. 3787) provides in pertinent part:

SEC. 91. *Who may render official interpretations, and the effect thereof.* (a) Action taken in reliance upon, and in conformity with, an

official interpretation of a provision of any ceiling price regulation or order * * * will constitute action in good faith pursuant to the provisions of the ceiling price regulation or order to which such official interpretation relates.

SEC. 92. *Requests for interpretations; form and contents.* Any person desiring an official interpretation of a ceiling price regulation or order should request it in writing from the District Counsel of his local District Office * * *.[4]

D. *Office of Price Stabilization Ceiling Price Regulation 5—Iron and Steel Scrap* (16 F.R. 12000) provides in pertinent part:

SECTION 1. *What this regulation does and prohibitions.* (a) This regulation establishes ceiling prices and fees for:

(1) All sales and deliveries, including export sales and sales for export, by any person of prepared and unprepared steel scrap;

* * * * *

(b) *Prohibitions against dealing in iron and steel scrap at prices above ceiling.* On and after October 30, 1951, regardless of any contract or other obligations:

(1) No person shall sell, deliver, buy, receive, or prepare iron or steel scrap or agree, offer, solicit, or attempt to do any of the fore-

[4] These regulations, dated April 28, 1952, took the place of identical provisions in Sections 71 and 72 of Price Procedural Regulation No. 1 of May 26, 1951 (16 F.R. 4974).

going at prices above those established in this regulation;

* * * * *

SEC. 3. *Basing point prices for steel scrap of dealer and industrial origin*—(a) *Basing point prices from which maximum shipping prices are computed*—(1) *Basing point prices for the base grade, No. 1 bundles, Grade 1:*

Basing point:	*Price per gross ton*
Alabama City, Ala.	$39.00
Ashland, Ky.	42.00
Atlanta, Ga.	39.00
Bethlehem, Pa.	42.00
Birmingham, Ala.	39.00
Brackenridge, Pa.	44.00
Buffalo, N. Y.	43.00
Butler, Pa.	44.00
Canton, Ohio	44.00
Chicago, Ill.	42.50
Cincinnati, Ohio	43.00
Claymont, Del.	42.50
Cleveland, Ohio	43.00
Coatesville, Pa.	42.50
Conshohocken, Pa.	42.50
Detroit, Mich.	41.15
Duluth, Minn.	40.00
Harrisburg, Pa.	42.50
Houston, Tex.	37.00
Johnstown, Pa.	44.00
Kansas City, Mo.	39.50
Kokomo, Ind.	42.00
Los Angeles, Calif.	35.00

Basing point:	*Price per gross ton*
Middletown, Ohio	43.00
Midland, Pa.	44.00
Minnequa, Colo.	38.00
Monessen, Pa.	44.00
Phoenixville, Pa.	42.50
Pittsburg, Calif.	35.00
Pittsburgh, Pa.	44.00
Portland, Oreg.	35.00
Portsmouth, Ohio	42.00
St. Louis, Mo.	41.00
San Francisco, Calif.	35.00
Seattle, Wash.	35.00
Sharon, Pa.	44.00
Sparrows Point, Md.	42.00
Steubenville, Ohio	44.00
Warren, Ohio	44.00
Weirton, W. Va.	44.00
Youngstown, Ohio	44.00

(2) *Differentials per gross ton above or below the price of Grade 1 (No. 1 bundles) for other grades of steel scrap.*

OPEN HEARTH AND BLAST FURNACE GRADES

Grades	*Differentials*
2. No. 1 busheling	Base
3. No. 1 heavy melting steel	—$1.00
4. No. 2 heavy melting steel	—1.00
5. No. 2 bundles	—1.00
6. Machine shop turnings	—10.00
7. Mixed borings and short turnings	—6.00

Grades	*Differentials*
8. Shoveling turnings	—6.00
9. No. 2 busheling	—4.00
10. Cast iron borings	—6.00
ELECTRIC FURNACE AND FOUNDRY GRADES	
11. Billet, bloom and forge crop.	+7.50
12. Bar crops and plate scrap..	+5.00
13. Cast steel	+5.00
14. Punchings and plate scrap ..	+2.50
15. Electric furnace bundles ...	+2.00
16. Cut structural and plate scrap 3′ and under	+3.00
17. Cut structural and plate scrap 2′ and under	+5.00
18. Cut structural and plate scrap 1′ and under	+6.00
19. Briqueted cast iron borings .	Base
20. Foundry steel, 2′ and under .	Base
21. Foundry steel, 1′ and under .	+2.00
22. Springs and crankshafts	+1.00
23. Alloy free turnings	—3.00
24. Heavy turnings	—1.00
25. Briqueted turnings	Base
26. No. 1 chemical borings	—3.00
27. No. 2 chemical borings	—4.00
28. Wrought iron	+10.00
29. Shafting	+10.00
30. Hard steel cut 2′ and under..	+5.00
31. Old tin and terne plate bundles	—10.00

UNPREPARED GRADES

Grades	*Differentials*
32. Unprepared steel scrap which when compressed constitutes No. 1 bundles	—6.00
33. Unprepared steel scrap which when compressed constitutes No. 2 bundles	—9.00
34. Unprepared steel scrap other than material suitable for hydraulic compression ...	—8.00

* * * * *

SEC. 4. *Ceiling shipping point prices for steel scrap of dealer and industrial origin.* (a) For shipping points located within a basing point named in section 3 hereof, the ceiling shipping point price for any grade of steel scrap shall be the price established at such basing point, minus the applicable switching charge deduction set forth in section 5 hereof.

(b) For shipping points located outside the basing points named in section 3 hereof, the ceiling shipping point price of any grade of iron or steel scrap shall be the price established for the scrap at the most favorable basing point, minus the lowest established charge for transporting scrap from the shipping point to such basing point by rail or water carrier, or combination thereof. (The most favorable basing point is the basing point named in section 3 hereof which will yield the highest shipping point price.)

* * * * *

SEC. 23. *Steel grades of dealer and industrial origin.* All grades must be free of dirt, non-ferrous metals or foreign material of any kind and free of excessive rust and corrosion.

(a) *Basic open hearth and blast furnace grades.* (The numbering of the paragraphs does not necessarily correspond to the grade numbers established in section 3 of this regulation).

(1) *No. 1 heavy melting steel.* Clean wrought iron or steel scrap ¼ inch and over in thickness, not over 18 inches in width and not over 5 feet in length. Individual pieces must be free from attachments, and so cut as to lie flat in the charging box. May include heavy forgings, forge butts, billet, bloom, slab or bar crops not conforming to chemical analysis required for electric furnace or acid open hearth use. May include new pipe ends. May not include auto body and fender stock.

(2) *No. 2 heavy melting steel.* Wrought iron or steel scrap, black or galvanized, ⅛ inch and over in thickness, not over 18 inches in width and not over 5 feet in length. (Uncut bumpers and front axles of passenger automobiles, and uncut rear ends of passenger automobiles free of wheels and brake assemblies and drained of oil, may be included even though over 5 feet in length.) Individual pieces must be free from attachments and so cut as to lie flat in the charging box. May include pipe; heavy oil field or similar cable not less than 1 inch in diameter and cut to lengths of 3 feet or less; and car sides and light plate cut 15 inches by 15 inches or under.

May not include auto body and fender stock.

(3) *No. 1 busheling.* Clean new wrought iron or steel scrap 1/16 inch and over in thickness, not exceeding 12 inches in any dimension, including new factory busheling 20 gauge or heavier (for example, sheet clippings, stampings, etc.) and steel cartridge cases 40 mm. or less. May not contain burnt material or auto body and fender stock. Must be free of metal coated, limed or porcelain enameled stock.

(4) *No. 1 bundles.* New black steel sheet scrap, clippings, or skeleton scrap, hydraulically compressed or hand bundled to charging box size and weighing not less than 75 pounds per cubic foot. (Hand bundles must also be tightly secured and stand handling with a magnet.) Must be free of paint or protective coating of any kind. May include Stanley balls, or mandrel wound bundles or skeleton reels, tightly secured. May include chemically detinned material. No tin can will be deemed to be detinned unless it has undergone the chemical process for the removal and recovery of tin. May not include electrical sheets, or any material over 0.5% of silicon.

(5) *No. 2 bundles.* Body and fender scrap, or old black and/or galvanized scrap, hydraulically compressed to charging box size and weighing not less than 75 pounds per cubic foot. May include galvanized, but not vitreous enameled stock, tin plate, terne plate or other metal coated material. Painted or lacquered material shall not be considered as coated material. May include hydraulically compressed black or galvanized fence wire, light coil spring

and any bundles which are excluded from No. 1 bundles by reason of their containing painted, lacquered, lithographed or galvanized material.

(6) *Machine shop turnings.* Clean steel or wrought iron turnings, free of cast or malleable iron borings, nonferrous metals in a free state, scale or excessive oil. May not contain badly rusted or corroded stock.

(7) *Mixed borings and turnings.* Shoveling turnings mixed with cast or malleable iron borings and drillings, free of scale or excessive oil or nonferrous metals in a free state. May not contain badly rusted or corroded stock.

(8) *Shoveling turnings.* Clean short steel or wrought iron turnings, drillings or screw cuttings. May include any such material whether resulting from crushing, raking or other processes. Must be free of springy, bushy, tangled or matted material, lumps, nonferrous metals in a free state, scale, grindings, or excessive oil.

(9) *No. 2 busheling.* Cut hoops, netting, cut unbaled fence wire, light sheets, rusted car sides, cotton ties, and galvanized light material. No dimension over 12 inches. May be black or galvanized. May include oil field or similar cable cut to lengths of 2 feet or less and machine gun clips. No hard steel, porcelain enameled, or metal coated material may be included.

(10) *Cast iron borings.* Clean cast iron or malleable iron borings and drillings, free of steel turnings, scale, lumps and excessive oil.

(b) *Electric furnace and foundry grades.*

(11) *Billet, bloom and forge crops.* Billet,

bloom, axle, slab, heavy plate and heavy forge crops, not over 0.05% phosphorus or sulphur and not over 0.5% silicon, free from alloys. Must not be less than 2 inches in thickness, not over 18 inches in width and not over 36 inches in length. Must be new material delivered to the consumer directly from the industrial producer.

(12) *Bar crops and plate scrap.* Bar crops, plate scrap, forgings, bits, jars and tool joints, containing not over 0.05% phosphorus or sulphur, not over 0.5% silicon, free from alloys. Must not be less than ½ inch in thickness, not over 18 inches in width and not over 36 inches in length.

(13) *Cast steel.* Steel castings not over 48 inches long, 18 inches wide and ¼ inch in thickness, containing not over 0.05% phosphorus or sulphur, free from alloys and attachments. May include heads, gates and risers.

(14) *Punchings and plate scrap.* Punchings or stampings, plate scrap and bar crops containing not over 0.05% phosphorus or sulphur and not over 0.5% silicon, free from alloys. All material must be cut 12 inches and under and with the exception of punchings or stampings must be at least ⅛ inch in thickness. Punchings and stampings may be of any gauge but must not be more than 6 inches in diameter.

(15) *Electric furnace bundles.* New black steel sheet scrap hydraulically compressed into bundles 14 x 14 x 20 inches or smaller.

(16) *Cut structural and plate scrap, 3 feet and under.* Clean open hearth steel plates,

structural shapes, crop ends, shearings, or broken steel tires. Must be not less than ¼ inch in thickness, nor over 3 feet in length and 18 inches in width. Must not contain over 0.05% phosphorus or sulphur.

(17) *Cut structural and plate scrap, 2 feet and under.* Clean open hearth steel plates, structural shapes, crop ends, shearings, or broken steel tires. Must be not less than ¼ inch in thickness, not over 2 feet in length and 18 inches in width. Must not contain over 0.05% phosphorus or sulphur.

(18) *Cut structural and plate scrap, 1 foot and under.* Clean open hearth steel plates, structural shapes, crop ends, shearings, or broken steel tires. Must be not less than ¼ inch in thickness or over 1 foot in length or width. Must not contain over 0.05% of phosphorus or sulphur.

(19) *Briquetted cast iron borings.* Cast iron borings, Grade 12, compressed into a cohesive solid, reasonably free from oil, each briquette to weight not more than 20 pounds and to have a density of not less than 60 percent.

(20) *Foundry steel, 2 feet and under.* Steel scrap ⅛ inch and over in thickness, not over 2 feet in length or 18 inches in width. Individual pieces must be free from attachments. May not include nonferrous metals, metal coated material, cast or malleable iron, body and fender stock, cable, enameled or galvanized material.

(21) *Foundry steel, 1 foot and under.* Steel scrap ⅛ inch and over in thickness, not over 1 foot in length or width. Individual pieces must be free from attachments. May not in-

clude nonferrous metals, metal coated material, cast or malleable iron, body and fender stock, cable, enameled or galvanized material.

(22) *Springs and crankshafts.* Clean automotive springs and crankshafts, either new or used.

(23) *Alloy free turnings.* New, short, clean steel turnings free from lumps, tangled or matted material, cast iron borings, or excessive oil, containing not more than 0.05% phosphorus or sulphur and free of alloys. Must be delivered to the consumer directly from the industrial producer.

(24) *Heavy turnings.* Short, heavy steel turnings, containing not over 0.05% phosphorus or sulphur and free of alloys. May include rail chips. May not include machine shop or other light turnings and must weigh not less than 75 pounds per cubic foot in the original state of production.

(c) *Special grades.*

(25) *Briquetted turnings.* Steel turnings compressed into a cohesive solid, reasonably free from oil, each briquette to weigh not more than 20 pounds and to have a density of not less than 60 percent.

(26) *No. 1 chemical borings.* New clean cast or malleable iron borings and drillings containing not more than 1% oil, free from steel turnings, or chips, lumps, scale, corroded or rusty material.

(27) *No. 2 chemical borings.* New clean cast or malleable iron borings and drillings, containing not more than 1.50% oil, free from steel

turnings, or chips, lumps, scale, corroded or rusty material.

(28) *Wrought iron.* Clean wrought iron scrap, free of steel and with rivets and attachments removed. May include structural shapes, plates, bars, pipes, staybolts or any other material known to have been manufactured from wrought iron.

(29) *Shafting.* Random length shafting suitable without further preparation for rerolling, or forging. Must be reasonably straight and free of attachments.

(30) *Hard steel cut 2 feet and under.* Automotive steel consisting of rear ends, crankshafts, driveshafts, front axles, springs and gears prepared 2 feet and under. May not include miscellaneous small shoveling steel or any pieces too bulky for gray iron foundry use.

(31) *Old tin and terne plate bundles.* Old tin plated and terne plated steel scrap hydraulically or mechanically compressed to charging box size.

* * * * *

SEC. 28. *Definitions.* * * *

* * * * *

(n) "Unprepared scrap." The term shall have its customary trade meaning and shall not include such demolition projects as automobiles, bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its own wheels. Prior to demolition such projects are not iron and steel scrap and must be priced under the applicable pro-

visions of the General Ceiling Price Regulation.

* * * * *

SEC. 32. *Enforcement.* Persons violating any provision of this regulation are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided by the Defense Production Act of 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 293888 1201

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No. 631

Office - Supreme Court, U.
FILED
APR 29 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

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vs.

CHARLES H. KENDALL, Assistant Director, Office of Defense Mobilization.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

REPLY BRIEF OF PETITIONERS

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AVAILABILITY OF ADMINISTRATIVE INTERPRETATION

Respondent relies heavily on the petitioners' failure to obtain an official interpretation from OPS as to the meaning of CPR 5. Apparently it is the position of respondent that because Price Procedural Regulation 1 (17 F.R. 3787) permitted those subject to price regulations to obtain official interpretations as to the meaning thereof, the Administrator's duty (to promulgate regulations which clearly and unambiguously advised those subject thereto as to the conduct which would result in criminal penalties) was somehow less stringent than the duty which the courts have imposed upon legislative bodies in the enactment of penal statutes. The respondent's theory that administrative regulations are

less strictly subject to the constitutional inhibitions against vague and indefinite legislation is fortunately not the law.

In *M. Kraus & Bros. v. United States,* 327 U.S. 614, 90 L.ed. 894, this court was concerned with revised Maximum Price Regulation 269 promulgated under the Emergency Price Control Act of 1942. The question there was whether "combination sales" and "tying agreements" were within the inhibition of Section 1429.5 of the Regulation. Mr. Justice Murphy said at page 898 of the Law Edition Opinion (327 U.S. 621):

> "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. * * * A Prosecutor in framing an indictment, a court in interpreting theAdministrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. *Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language.* The prohibited con-

> duct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability." (Italics added)

Respondent's contention that the Director of Price Stabilization or his "District Counsel" could somehow breath life into an unconstitutionally vague and indefinite regulation is clearly erroneous. It might as well have been argued in the *Kraus* case that the defendants' failure to inquire in advance whether their "combination sales" amounted to a violation of the Regulation deprived them of the right to later challenge the vague and indefinite language of the Regulation itself. An administrative regulation (as is the case with any penal statute) must set forth clearly on its face that conduct which will result in criminal liability.

Nor does the single case cited by respondent support his position. In *Taylor v. Porter,* 156 F.(2d) 805 (E.C.A.), cited page 6 of respondent's brief, the court was confronted with rent regulations which contained provisions authorizing those subject thereto to submit to the Administrator *questions of fact* for determination in ascertaining which provisions of a *clear and unambiguous* regulation were applicable to rented premises. The court stated at page 810:

> "We find no ambiguity in the sections of the Regulation to which the complainant directs his attack. * * * The real issue is not as to the clarity of the Regulation, but rather whether the contract with Mrs. Flynn was effective to change the character of

the apartment from fully furnished to unfurnished and whether the installation of the laundry equipment was in fact a major capital improvement."

The Emergency Court of Appeals commented upon the failure of the complainant to submit to the Administrator the *factual* question for determination. It did not, as respondent would have this court believe, sustain an otherwise vague regulation because of the availability of "official interpretations" as to the meaning of the regulation itself.

Respondent's position here is not that petitioners should have obtained a *factual interpretation.* Rather respondent contends that petitioners should have inquired as to what the law meant. As in the *Kraus* case, the failure of the Administrator to define as an offense the act which the Prosecutor now seeks to punish was not an omission which could be cured by "interpretation." If the omission in the regulation could not have been cured by administrative interpretation, it could hardly be cured by the petitioners' failure to seek such an interpretation.

UNLAWFUL DELEGATION OF POWER TO PRIVATE INDIVIDUALS

The respondent dismisses the petitioners' contentions as to the unlawful delegation of regulatory power to private individuals with a single footnote at page 9 of respondent's brief. Respondent's footnote misses the point. It may be conceded that Congress intended to and did by law entrust to the Administrator the power to fix price ceilings and to define the commodities for which ceilings were prescribed. The point here made by

petitioners is that in describing regulated commodities only as having "their customary trade meaning" the Administrator abandoned and abdicated his function of definition to the trade at large. To paraphrase the language of *Carter v. Carter Coal Company,* 298 U.S. 238, 80 L.ed. 1160 (petitioners' brief, page 23) this Administrator in effect conferred upon the trade at large the power to regulate the affairs of an unwilling minority. One person was entrusted with the power to regulate the business of another and especially that of a competitor. It is established that "in the parlance of the trade, prepared scrap is scrap of a required condition and quality which will lie flat in the charging box *of the standard furnace designed to handle that scrap* * * * " (R. 16). It is further established that the largest of the two electric furnaces operated by the corporate petitioner has only a ten-foot diameter inner shell with a rounded bottom (R. 6) and that scrap items "to be prepared" as to the corporate petitioner's melting operations may not be more than eighteen inches in maximum dimension (R. 6-9). Accordingly, although scrap items may conform in every respect to the specifications for Grades 3 and 4, or to the specifications for Grades 11, 12, 13, 16 and 17 of CPR 5 (all the grades referred to being "prepared grades" according to the contentions of the respondent) such scrap items are nevertheless "unprepared" as to the corporate petitioner because requiring further preparation prior to use by it (R. 5-9). It is further undisputed that the needs and melting facilities of consumers of iron and steel scrap may and do differ widely (R. 5-9). Scrap items which are "unprepared" as to one consumer because requiring further prepara-

tion by him prior to use are nevertheless "prepared" as to another whose furnace may be larger or whose operational procedures may differ (R. 5-9). Should a particular consumer alter the size of his melting facilities, scrap which had theretofore been "unprepared" as to him would become "prepared" or vice versa (R. 5-9).

It is plain that the trade *in fact* had no custom at all sufficient to give the term "unprepared scrap" any definitive meaning. Even if the practices of a majority of scrap consumers were conceded to be so stabilized as to result in a "custom" among *them* as to scrap items which were deemed "unprepared" should the corporate and individual petitioners be bound by such a definition or presumed to have knowledge of it? Such an alleged "custom" could hardly be definite enough to provide the corporate petitioner, and particularly the individual petitioners, with an adequate standard properly warning them in advance of the type of purchases made criminal by the Regulation.

A case closely in point as to the practice attempted by the Administrator in CPR 5, is *State v. Crawford,* 104 Kan. 141, 177 Pac. 360, 2 A.L.R. 880. There the Legislature of the State of Kansas had provided penal sanctions to enforce its fire prevention act which required that "all electric wiring shall be in accordance with the National Electrical Code." It was shown that the National Electrical Code was promulgated by a body of private individuals and voluntary unofficial organizations which met occasionally throughout the United States. The rules were revised from time to time. It was held that the statute was an attempt to delegate the leg-

islative power of the state to private persons and it was for that reason unconstitutional and void for uncertainty. The Kansas Court said:

"But none of the cases cited has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons like the National Fire Protective Association, the power to promulgate rules for the government of the people of this State, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, the situation would arise where owners of property with considerable persistence might learn what these code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the Code and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these code rules are. The laws of this State to which our people owe obedience must be officially published. * * * But the fallacy of such legislation in a free, enlightened and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the National Electrical Code as a law of this State, it should copy that rule, and give it a title, and an enacting clause, and pass is through the Senate and the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it,

and then hand it over to the Secretary of State of publication."

CONCLUSION

The failure of CPR 5 to fix any adequate definition for the term "unprepared scrap" renders it invalid and unconstitutional and it is respectfully submitted that the Petition for *Writ of Certiorari* herein should be granted.

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